
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: NOV 1 1989
CASE NO: 87 ERA 25

J. MARSHALL TRIEBER,
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent,

and

SYSTEM ENERGY RESOURCES, INC., Respondent,

DECISION AND ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

These proceedings arise under the "whistleblower" protection provisions of the Energy Reorganization Act of 1974 (ERA), § 210(a), as amended, 42 U.S.C. § 5851, and implemented by 29 C.F.R. § 24.1 et *seq*.

The question to be decided is whether Respondents are entitled to summary judgment due to Complainant's failure to come forth with sufficient evidence to show that a genuine issue of material fact exists.

Background

J. Marshall Trieber, Complainant, has filed two complaints with the, Employment Standards Administration, Wage and Hour Division, of the U.S. Department of Labor (DOL). The first, a complainant against Respondent System Energy Resources, Inc., formerly known as Mississippi Power and Light Company, (SERI/MPL), was filed in the DOL Mississippi office on February 13, 1987. The second, a complaint against Respondent Tennessee Valley Authority (TVA) was filed in the DOL Tennessee office on March 16, 1967.

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Complaint against SERI/MPL

Complainant was employed by SERI/MPL from January 3, 1984 until January 29, 1986 when he was abruptly terminated and escorted from the premises. Complainant alleges the circumstances following his dismissal with regard to his attempts to secure employment elsewhere indicate he was blacklisted by SERI/MPL.

Specifically, in July of 1986 he was brought to New York at substantial expense to Long Island Lighting Company (LILCO) for an interview at its Shoreham Nuclear Power Station. Complainant alleges that upon arrival he received only a token Interview and no explanation for LILCO's sudden decreased interest in him as a potential employee.

Complainant alleges he received a letter of interest from the engineering company of Stone and Webster in September of 1986, requesting contact of a specified individual, via collect telephone call, to discuss an employment opportunity. After having placed two well-received collect calls, he telephoned to arrange for an interview; the specified individual, without explanation, would not accept his call.

Following a continued and lengthy period of unemployment, Complainant filed a complaint against SERI/MPL. Therein he alleged that he had been fired by SERI/MPL in retaliation for having filed internal reports which were critical of its training staff; for filing a report identifying deficiencies in the operation of the Grand Gulf Nuclear Power Plant, and for filing a complaint with an ombudsman regarding substandard contractors' work. He submitted that these actions on his part, in addition to other incidents of "ill will". provided SERI/MPL with a motive to interfere with his future employment which may explain why LILCO and Stone and Webster did not offer him an employment position despite initial interest.

Complaint against TVA

On March 4, 1987 Complainant was hired by TVA. This position was obtained through a "job shop" contractor, CDI Corporation, and was to be for a six month period. He initially reported to TVA's Knoxville office on March 4, 1987 and reported

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to its Sequoyah Nuclear Plant on March 9, 1987. Two and one-half days after arriving at the Sequoyah facility, Complainant's employment was terminated. Richard Thompson, his supervisor, informed him that "inputs" had been received.

On the day that Complainant was terminated by TVA, SERI/MPL received a telephone call from DOL's Mississippi office with information that Complainant had filed a

complaint alleging discriminatory conduct on the part of SERI/MPL. Complainant contends the coincidence of this phone call indicates this was the "input" received, and TVA consequently discharged him in cooperation with SERI/MPL's alleged blacklisting efforts. Thereafter, Complainant filed this complaint against TVA alleging they cooperated with SERI/MPL's continued blacklisting efforts.

On April 13, 1987 Complainant was notified by DOL's Tennessee office that their investigation had concluded that his allegations of blacklisting were "unprovable". This finding was based on DOL's inability to substantiate that contacts had in fact, occurred amongst SERI/MPL, LILCO, Stone and Webster, TVA and any of Complainant's potential employers.

Complainant filed a timely request on May 4, 1987 with this office requesting a formal hearing on his complaints.

Motions for Summary Judgment

TVA's Motion

On July 19, 1988 TVA filed a Motion for Summary Judgment which was accompanied by a supporting brief, deposition of Complainant, affidavits of Richard Thompson, former supervisor of the training staff at TVA; James Hartman, training officer on TVA's engineering assurance staff; and William DeFord, assistant manager of engineering assurance at TVA. The basis of TVA's motion is that Complainant cannot carry his burden of proof to establish that TVA discharged him. in cooperation with SERI/MPL's alleged blacklisting efforts. In support of this motion TVA asserts the following:

1. The TVA supervisors (Thompson and DeFord) who met Complainant on March 4, 1987 had doubts about his ability to perform as a trainer on TVA's engineering assurance staff; however, they sent him to TVA's Sequoyah Nuclear Plant where

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Complainant did report on March 9, 1987.

2. On March 11, 1967 the training staff supervisor, Richard Thompson, was told by the TVA's Sequoyah trainer, James Hartman, that Complainant was not suited for his particular job.

3. Mr. Thompson, with the concurrence of his supervisor, Mr. DeFord, decided to terminate Complainant; he was discharged on March 11, 1987.

4. Prior to Complainant's termination, none of the involved three TVA personnel had contact with SERI/MPL; nor did they know anyone who worked for SERI/MPL.

5. Complainant has admitted in his deposition that he has no direct evidence of a TVA-SERI/MPL link regarding his termination.

SERI/MPL's Motion

On August 4, 1988 SERI/MPL filed its Motion for Summary Judgment. Enclosed with the motion was a supporting brief, excerpts from Complainant's deposition, affidavits from Jerry Yelverton, currently manager of plant operations at SERI/MPL; Kenneth Beatty, training superintendent; Robert Halbach, formerly in the human resources department, currently administrative assistant to the general manager; Charles Hutchinson, former engineer, currently a general manager; Frank Wagner, manager of employee relations; and William Kuh, director of personnel for SERI/MPL. Additional documents, duplicative of material already filed, were also included.

SERI/MPL's motion is founded upon the grounds that the Complainant has failed to come forth with specific facts establishing the existence of genuine disputes of material fact and with any evidence which support a prima facie case of blacklisting.

The essence of SERI/MPL's motion for summary judgment is based on the following:

1. Complainant was employed by SERI/MPL from January, 1984 until he was terminated in February of 1986.

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2. Complainant testified in his deposition that he did not have any information that LILCO contacted or was contacted by SERI/MPL.

3. Complainant testified in his deposition that while he believes he was rejected for employment at Stone and webster because SERI/MPL engaged in blacklisting, he has no documentation or information in support of his belief.

4. Complainant has no direct evidence that SERI/MPL contacted LILCO or Stone and Webster or was contacted by them.

5. The affidavits of Messrs. Beatty, Yelverton, Halbach, Hutchinson and Kuh establish those individuals neither contacted, nor were contacted, by anyone at LILCO, Stone and Webster or TVA.

6. These affidavits established that neither of those individuals nor any one else at SERI/MPL participated in any attempt to blacklist. Complainant.

7. Frank Wagner, manager of employee relations, investigated Complainant's allegations; his investigation revealed that no one at LILCO or Stone and Webster had any contact with SERI/MPL regarding Complainant.

B. Complainant has no knowledge of anyone at SERI/MPL who knew he was going to work for TVA in March of 1987.

9. Complainant's claim of blacklisting is not covered by the ERA, § 210(a), 42 U.S.C. § 5851(a) because Complainant's filing of internal reports with SERI/MPL auditors alleging substandard work by contractors is outside the scope of § 5851(a).

Procedural History Prior to Complainant's Response

In view of the elapsed time between the summary judgment motions and Complainant's response, a review of the procedural history is necessary.

On September 22, 1988 Complainant moved to take limited discovery by way of deposing SERI/MPL and TVA employees. This motion was opposed by both Respondents. SERI/MPL submitted a memorandum opposing extension of discovery time on the basis that Complainant has had ample time to complete discovery.

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An Order issued on October 26, 1988 stating: Respondents' Motions for Summary Judgment would be taken under advisement until Complainant had completed the requested discovery; that Complainant complete the discovery on or before 60 days from October 26, 1988; and that leave was granted to all parties to submit final position statements on the respective summary judgment motions within 20 days of Complainant's completion of discovery.

On December 20, 1988 Complainant moved for an extension of time to complete discovery and respond to the summary judgment motions based on the geographical relocation of two potential affiants who are no longer employed by TVA. SERI/MPL objected to this motion on December 29, 1988 asserting unnecessary delay. TVA also submitted a memorandum on this same day in "vigorous" opposition to Complainant's motion contending that Complainant is experiencing delay because of tactical choices or inaction.

An Order issued on January 1, 1989 staying the time for submitting final position statements on the summary judgment motions. Further, the Complainant was Ordered to submit his reasons for explaining why the requested discovery was not completed within the provided time constraints.

On January 19, 1989 Complainant submitted additional reasons in support of his motion requesting extended discovery time; namely, the deposition transcripts of SERI/MPL representatives had not been received; based on the depositions taken, it would be necessary to depose former TVA employees; attempts were being made to limit complainant's legal expenses by securing local counsel to depose the relocated TVA employees; and TVA had not provided the requested documentation. Accordingly,

Complainant also moved for an order compelling Respondents' to comply with the request for production of documents.

SERI/MPL's objection to Complainant's request for production of documents was also received on January 19, 1989. On January 30, 1989, SERI/MPL filed a response to Complainant's supplemental motion requesting an extension of discovery arguing that Complainant's own action, or inaction, was responsible for delaying resolution of this complaint. SERI/MPL further alleged that the October 26, 1988 Order only authorized limited discovery; therefore, the request for production of documents was outside the scope of the Order.

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Subsequent to consideration of the above, an order issued on February 10, 1989 wherein Complainant was granted additional time to complete discovery. In addition, Complainant was ordered to provide: (1) names of witnesses and dates for further depositions, (2) date by which all transcripts of said depositions should be available, (3) specific identification of the documents sought to be produced, and (4) any information relating to completion of discovery which would assist in scheduling a closing date. Complainant provided the information requested on February 22, 1989.

Complainant filed a supplement to his previous motion on April 4, 1989 requesting additional discovery time and requesting production of documents. Orders were issued by the undersigned on April 13, 1989 which granted Complainant's request for additional discovery time and addressed each of the Respondents' objections to Complainant's motion.

On May 16, 1989 TVA filed additional responses to Complainant's request to produce. on May 17, 1989 SERI/MPL responded to the request to produce. Following the responses of TVA and SERI/MPL, an Order issued on June 21, 1989 granting leave to Complainant to complete discovery for response to Respondents' summary Judgment motions by July 21, 1989 and to submit his response by August 4, 1989. This Order further provided that additional leave, relative to the completion of discovery, would be granted only upon a showing of extraordinary circumstances and/or need.

Complainant filed his response to Respondents' summary judgment motions on August 4, 1989 and further moved for partial summary judgment. That motion was determined to be premature and was dismissed on August 8, 1989.

On August 11, 1989 SERI/MPL filed a motion requesting leave to file a reply memorandum, which was granted. This reply memorandum was filed on August 30, 1989.

TVA moved for leave to reply in support of its prior motion for summary judgment on August 17, 1989. Its reply memorandum was included with the motion.

On August 21, 1989 Complainant moved for leave to file a supplemental memorandum in support of his response opposing

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summary judgment. Prior to court permission, Complainant filed his reply/supplemental memorandum on August 28, 1989.

Both SERI/MPL and TVA on August 24th and 25th, 1989 respectively, opposed Complainant's request to file a reply/supplemental memo. On September 6, 1989 SERI/MPL moved to strike Complainant's supplemental response; TVA adopted SERI/MPL's motion to strike as their own on September 15, 1989. Complainant in turn opposed Respondents' motions on September 13th and 20th of 1989.

Complainant's Response to Summary Judgment Motions

Complainant's response to Respondents' summary judgment motions was filed on August 4, 1989. Included with the supporting brief were numerous documents numbered I through 34; also included was an affidavit of Complainant with five additional attachments. In sum, Complainant's response in opposition to summary judgment with respect to SERI/MPL asserts the following:

1. Complainant formerly worked for TVA from 1979 to 1980.

2. In October of 1983, Mr. Ziegle, from TVA, responded to a telephone call from SERI/MPL confirming that Complainant had been employed by TVA (one of three telephone reference checks made by SERI/MPL regarding Complainant).

3. Complainant, was hired by SERI/MPL in January of 1984 as a training support supervisor.

4. A memo dated January 13, 1986 and written by Ken Beatty, training supervisor at SERI/MPL, stated in part that Complainant " ... [having had his major responsibilities removed] was not to interface with outside organizations without prior approval, [and Complainant] was rendered harmless, ...".

5. Ken Beatty's memo describes alleged acts of "insubordination" on the part of Complainant which Complainant asserts indicate a high level of animus directed toward him by Ken Beatty.

6. Ken Beatty recommended Complainant be interviewed for psychological testing, job performance and behavior problems;

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Complainant complied and underwent psychological screening.

7. Complainant's criticisms of an outside contractor working for SERI/MPL are supported by an internal audit report; copies of that report were reviewed by Charles Hutchinson and Ken Beatty.

8. In January of 1986 Complainant filed a report with an ombudsman alleging harassment and reporting the psychological screening he was requested to undergo; Charles Hutchinson learned this report had been filed on January 16th or 17th of 1986.

9. On January 17, 1966 Charles Hutchinson prepared a report recommending Complainant be dismissed from SERI/MPL employ; it was further recommended Complainant be given an opportunity to resign; however, Complainant was terminated instead on January 29, 1986.

10. The conclusion to be drawn from the conduct of SERI/MPL employees (Beatty, Yelverton and Hutchinson) is that they engaged in an extended harassment campaign, and the malice shown was translated into a blacklisting campaign which circumstantial evidence supports.

Complainant's assertions opposing TVA's motion for summary judgment are summarized as follows:

1. Complainant worked for TVA from 1978 through 1980 as a senior technical editor; he was again hired by TVA on March 4, 1987 as an instructor.

2. Complainant was terminated by TVA on March 11, 1987 for alleged inadequate performance.

3. Richard Thompson examined Complainant's resume and advised Complainant he was being hired; Complainant was to report for work on March 4, 1987 and would be paid the highest hourly rate.

4. There is no documentation provided by TVA to substantiate his alleged inadequate performance; there is no documentation evaluating Complainant's work.

5. The internal investigation report of William DeFord

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states that based on a complainant by James Hartman to Richard Thompson, Complainant was fired because he was not the type TVA was looking for, which is contrary to Complainant's affidavit.

6. Richard Thompson allegedly told William Bensen, an investigator for TVA, he had reservations about Complainant's ability to relate to the engineers; this contradicts Complainant's prior working history with TVA.

7. Richard Thompson had no contact with Complainant until March 11, 1987.

8. James Hartman's alleged advice to Richard Thompson that Complainant would not work out because he required "too much guidance" also contradicts the former assessments of Complainant's abilities.

9. James Hartman confirmed that Complainant nonetheless completed his work assignment even though he had been terminated and was under no obligation to do so.

10. A memo from TVA's inspector general notes the office of the inspector general was advised Complainant believes TVA management may have acted conspiratorially with SERI/MPL to blacklist him because he filed a complaint against SERI/MPL.

11. On March 11, 1987, at 9:30 a.m. CST, a DOL official contacted SERI/MPL to notify them about a complaint filed by Complainant; Complainant was terminated that same morning by TVA.

12. The nuclear industry is a close community; therefore, communications between individuals within that industry do occur.

Discussion

Admission of Parties' Supplemental Memoranda/Replies

All Parties have submitted additional material in further support of their respective positions on summary judgment; however, SERI/MPL is the only party to do so with the court's express prior permission.

SERI/MPL argues that complainant should not be allowed to

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file additional documentation because he has had over one year to file a response; Complainant has not shown extraordinary circumstances/need as directed by the Order of June 21, 1989, and SERI/MPL will incur additional costs/prejudice in order to respond to Complainant's new allegations. Further, SERI/MPL contends that Complainant's supplemental memorandum filed on August 28, 1989, as a supplement to his response filed on August 4, 1989, should not be received because 29 C.F.R. § 18.40 does not provide for its receipt, and § 18.6(b) expressly prohibits the filing of responsive documents absent provisions otherwise made by an administrative law judge.

On September 6, 1989 SERI/MPL moved to strike Complainant's supplemental memorandum from the record. Reiterating in part the aforementioned arguments, SERI/MPL contends: (1) the motion was filed two weeks after the court imposed deadline and five months after Complainant's associate counsel filed an appearance; (2) court permission had not been granted prior to the filing; (3) no copy of the supplemental memorandum was served on SERI/MPL's associate counsel whose appearance was filed on August 8, 1989; (4) SERI/MPL's Mississippi counsel did not receive a copy of the memo until September 5, 1989 since the envelope originally sent by Complainant was returned for postage; (5) as SERI/MPL's authorized reply to Complainant's response was to be filed by September 1, 1989, allowing Complainant's supplement precludes SERI/MPL the opportunity for a response; (7) the allegations in the no evidence of extraordinary circumstances and/or need to justify receipt of its multiple response; (7) the allegations in the supplemental memo are redundant and irrelevant, and (8) SERI/MPL's due process guarantees will be violated in that they have not had an opportunity to respond to the "eleventh hour" pleadings filed against it.

On September 15, 1989 TVA adopted SERI/MPL's motion to strike. Further, TVA noted a copy of Complainant's supplemental memo had been received because they requested co-respondent SERI/MPL to send a copy; however, the attached evidentiary materials had not yet been received.

Complainant responds to SERI/MPL's arguments by asserting in part, that the supplemental memo provides specific details which demonstrate the existence of a retaliatory motive on the part of SERI/MPL; that no envelope marked "returned for postage" was ever returned to Complainant's counsel; that if the

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supplemental material is redundant and irrelevant, Respondents are not harmed or prejudiced, and SERI/MPL's recently acquired associate counsel are not unfairly surprised because they have a long history and familiarity with the problems associated in representing nuclear facilities.

Regarding TVA's arguments, Complainant contends that a copy of the supplemental memo was mailed to TVA; both Respondents were on notice that a supplemental memo would be forthcoming based on Complainant's prior motion to file such; and lastly, Complainant notes that new evidence regarding records of monthly phone calls maintained by TVA has come to light.

Concededly, a substantial amount of time has passed since Respondents have moved for summary judgment and Complainant has responded. However, Complainant too, has incurred significant expense in pursuing his claim and has only recently secured associate counsel. Respondent SERI/MPL has also recently acquired associate counsel; given the procedural history of this dispute and in fairness to all parties, I do not find that the supplemental memorandum prepared by Complainant's recently acquired associate

counsel and submitted three weeks past the deadline for submitting a response should be stricken from the record on the basis of a procedural impropriety.

It should be noted that TVA moved for leave to file a reply in support of its motion for summary judgment on August 17, 1989, That reply was submitted along with the request for permission to do so notwithstanding the lack of prior leave or within the terms of 29 C.F.R. § 18.6(b). To the extent that Respondents base their motions to strike on the grounds that the supplemental memo was filed without prior permission permission is herein granted. Complainant's prematurely filed supplemental memo and TVA's prematurely filed reply are accepted.

Complainant sought permission to file a supplemental memo in order to clarify the issues and provide specific details in support of their position which I accept as a showing of need. Given the allegation is one of blacklisting, and involves issues of motive and intent, information is rarely immediately accessible. To the extent Complainant's supplemental memo is "redundant" and "irrelevant", no harm will come to either Respondent as the undersigned can and will disregard irrelevant or immaterial matter. To the extent Respondents believe they may

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be prejudiced by the lack of opportunity to respond to alleged "eleventh hour" pleadings, the subsequent findings on their motions for summary judgment render this argument moot.

Summary Judgment

The Federal Rules of Civil Procedure and the regulations governing the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, provide for summary judgment where there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c), 29 C.F.R. § 18.41(a).

Rule 56(c) states that summary judgment " ... shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Under § 18.41(a), "[w]here no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final [as provided under the appropriate regulations or statute]." Accordingly, the burden on the moving party, herein the Respondents, is to show there is no issue of material fact and that they are entitled to a judgment.

Under Rule 56(e), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must Bet forth specific facts showing that there is a

genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." The burden on the adverse party, or Complainant herein, is to come forth with specific facts that show there is a genuine issue for trial.

The Supreme Court has recently provided further clarification delineating the application of summary judgment and the attendant burdens on the respective parties under Rule 56(c). In *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986), the Court stated:

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> [Rule 56(c)] mandates the entry summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

In *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 257 (1986) (where the Court found the "clear and convincing" evidentiary standard must be used in determining summary judgment as applied to a libel suit), the general principles of summary judgment were also addressed. The Court here reiterated the burden on the opposing party is to present affirmative evidence in order to defeat a properly supported motion for summary judgment. Further, assuring there has been a full opportunity for discovery, this burden remains on the opposing party even if the evidence is likely to be in the possession of the moving party. *Ibid*.

Respondents' Motions for Summary Judgment

The burden on the Respondents is stringent; they must demonstrate no genuine issue of material fact, and any doubts will be resolved in favor of the non-moving party. See generally 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*: Civil § 2727, pp. 121-177 (1983).

Necessarily, the analysis must begin with the underlying support for Respondents' motions in order to determine whether their burden has been met and properly supported motions have been submitted which show no genuine issue of material fact.

SERI/MPL

Respondent SERI/MPL has submitted affidavits, in addition to other materials including the deposition of Complainant, to support its motion. The affidavits of Messrs. Yelverton, Beatty, Halbach, Hutchinson and Wagner assert they were acquainted with Complainant from January 1984 through February 1986; they neither contacted, nor were contacted by, anyone from Stone & Webster, LILCO or TVA concerning Complainant. Further, the affidavits deny any blacklisting or attempts to do so.

Complainant has not controverted these affidavits, but

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instead he has set forth the sequence of occurrences while employed by SERI/MPL which suggest to him he has been blacklisted.

TVA

In support of its motion, Respondent TVA has submitted the affidavits of Messrs. Thompson, Hartman and DeFord.

Mr. Thompson states Complainant was hired on his recommendation following a telephone interview. When Complainant reported to TVA's Knoxville office, Mr. Thompson alleges his impression was not favorable, nor was that of Mr. DeFord, Mr. Thompson's supervisor. Nonetheless, the decision was made to send Complainant to the Sequoyah facility.

Mr. Thompson went to the Sequoyah plant on March 11, 1987 where he was told by Mr. Hartman, senior trainer at Sequoyah, that Complainant "lacked the presence to be successful in the training course." In agreement with Mr. Hartman's assessment, Mr. Thompson decided to terminate Complainant from TVA employment. Mr. Thompson testified that he told Complainant that his skills and the job were mismatched. Mr. Thompson denied any knowledge concerning Complainant's prior employment with SERI/MPL or any knowledge concerning Complainant's attempts to secure employment with Stone & Webster and LILCO.

The affidavit of James Hartman states he first met Complainant in Knoxville and later showed him the facilities at Sequoyah. On March 11, 1987, when Mr. Thompson visited Sequoyah and inquired as to how Complainant was doing, Mr. Hartman testified his response was he felt Complainant was intelligent and diligent, but required more support than was available at Sequoyah. Mr. Hartman denied any knowledge as to the events concerning Complainant's employment at SERI/MPL, and denied ever having spoken to anyone from SERI/MPL, Stone & Webster, or LILCO.

The affidavit of Mr. DeFord states that he met the Complainant once early in March of 1987; he felt uncertain Complainant would be able to handle his assignment of conducting classes for TVA's nuclear engineering division, but instructed Mr. Thompson to send Complainant to Sequoyah to see how he worked out. Mr. DeFord alleges that when called by Mr. Thompson, he concurred in the decision to terminate Complainant. Prior to

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this, Mr. DeFord denies speaking to anyone outside of TVA about Complainant.

Complainant controvers the affidavits of Mr. Thompson and Mr. Hartman to the extent they aver his performance was unacceptable.

Complainant was deposed by Respondent TVA on May 18, 1988. His deposition testimony comports with that provided in the affidavits of Richard Thompson and James Hartman as to the sequence of events concerning his employment at TVA. Complainant asserts, however, that just prior to being fired, both Thompson and Hartman made favorable comments regarding his work; when Complainant asked Thompson why held been fired, the reply was "input" has been received you.

In response to the question of why TVA terminated him, Complainant answered: "I believe someone at TVA contacted someone at MP&L, or someone at MP&L contacted someone at TVA. Either way, my name was brought up, and either way somebody at MP&L said get rid of this guy. And TVA then fired me." (Trieber Dep. at 54).

When interviewed by William Benson, an investigator for TVA, Mr. Thompson alleged that "input" referred to the concurring opinions of Mr. DeFord and Mr. Hartman in the decision to terminate Complainant (Exh. 29; Complainant's August 4, 1989 response).

Complainant's Response

Complainant's responses, filed on August 4, 1980, and August 28, 1989, opposing Respondents' motions for summary judgment, set forth in detail the sequence of events which transpired while Complainant was employed at SERI/MPL. This chronology of events was proffered to establish the animus which Complainant asserts as the motive for blacklisting.

Complainant alleges discriminatory conduct, in the form of blacklisting, on the part of SERI/MPL. He contends that his treatment while employed by SERI/MPL establishes he was abruptly discharged in January of 1986 in retaliation for having raised safety concerns regarding SERI/MPL's operation of its Grand Gulf Nuclear Station. Further, he alleges the animus stemming from

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his treatment at SERI/MPL, the basis for his claim of blacklisting, has continued. Specifically, he claims that SERI/MPL's blacklisting efforts are the logical explanation for his inability to secure work for thirteen months following his termination by SERI/MPL. Moreover, Complainant alleges his abbreviated employment stint with TVA from March 4, 1987 through March 11, 1987 indicates not only that SERI/MPL is continuing to blacklist him, but that TVA has cooperated with SERI/MPL toward that end.

Conclusion

Where the Respondents have properly supported their motions pursuant to Rule 56(c), which they have via affidavits and other documentation Complainant cannot discharge his burden merely by offering a plausible explanation for his version of transpired events. That is, his burden goes beyond simply asserting a genuine issue for trial exists. Nor can he proceed to trial with the hope some evidence will be produced at that time, or that his ungrounded suspicions, albeit sincerely held, will be sufficient to defeat a motion for summary judgment. Wright, Miller & Kane, *supra*.

The Supreme Court has noted Rule 56(c) does not require the material fact, assuming it is present, to be resolved in the asserting party's favor, " ... rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986) citing *First National Bank of Arizona v. Cities Service Co*., 391 U.S. 25S (1968).

The claimed factual dispute is whether the Complainant has been blacklisted by Respondents. In order to defeat the motions for summary judgment, Complainant must come forth with sufficient evidence which establishes there is a material fact in dispute. Substantive law identifies which facts are material; Complainant therefore has the burden of establishing a *prima facie* case of discriminatory conduct, or blacklisting, by Respondents. As applied to the present case, the elements to a claim of discrimination under § 5851 must include proof that (1) SERI and TVA are employers subject to the ERA; (2) Complainant was discharged or discriminated against with respect to his compensation, terms, conditions, or privileges of employment, and

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(3) the alleged discrimination arose because Complainant participated in an activity protected by the ERA. *Mackowiak v. University Systems*, 735 F.2d 1159 (9th Cir. 1984).

With respect to the first element, both Respondents concede they are employers subject to the ERA. Regarding the second element, Complainant was discharged by both SERI/MPL and TVA; however, any claim of discriminatory discharge by SERI/MPL is concededly time barred under the Act. Moreover, the basis of the discriminatory conduct alleged is blacklisting by SERI/MPL and TVA through the latter's cooperation with the former's efforts. Assuming for the moment sufficient evidence has been brought forth to establish blacklisting occurred, the third element would be satisfied pursuant to 29 C.F.R. § 24.2(b) which specifically includes "blacklisting" as a prohibited form of discriminatory conduct. Notwithstanding Respondent SERI/MPL's contention to the contrary, blacklisting is a form of ongoing discriminatory conduct which is prohibited under the implementing regulations of the Act.

Further, with respect to the third element, SERI/MPL contends that Complainant's claim of blacklisting is not covered by the Act because as held by the Fifth Circuit, absent contact or involvement between Complainant and ma competent organ of government," there is no cognizable claim under Section 210 and "[t]he language of Section 5851 cannot be construed to protect the filing of purely internal quality control reports", *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031 (5th Cir, 1984). However, while Respondent states the position of the Fifth Circuit, other circuits as well as the Secretary of Labor read the legislative history behind the whistleblower protection statutes less restrictively. Moreover, it is not clear that Complainant bases his claim exclusively on the basis of having filed internal reports with SERI/MPL auditors. It appears instead Complainant's allegations stem from instances of alleged harassment, which suggest a motive for blacklisting, which again surfaced when SERI/MPL was notified that a DOL complaint had been filed against them.

Sufficiency of Complainant's Evidence

At the outset, I note the documents Complainant attached to his supplemental response which deal with the problems encountered by SERI/MPL in obtaining a license for the Grand Gulf

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Nuclear Plant, are irrelevant to his allegation of blacklisting. Nothing in those submitted materials is sufficient to support Complainant's contention that SERI/MPL and TVA cooperated in a blacklisting effort. Nor is there anything in those materials to indicate SERI/MPL and TVA had any contact with one another; in sum, other than the probably intended prejudicial value, those documents have no value in assisting Complainant with his burden of proof and are therefore disregarded.

Complainant concedes in his deposition testimony that he has no "direct [evidentiary] links" of contact among SERI/MPL, Stone & Webster, LILCO and TVA (Trieber Dep. al 56, 91, 92). He further concedes that no one from SERI/MPL officially knew he was going to work at TVA (Trieber Dep. at 541. Notwithstanding a lack of direct evidence, a complainant may submit direct, circumstantial or inferential evidence to show a genuine issue of fact exists. See *Fontenot v. Upjohn Co*. 780 F.2d 1190, 1196 (5th Cir. 1986). Complainant's evidence herein is insufficient to sustain the logical inferences necessary to justify a conclusion that "circumstantial" or "inferential" evidence has been brought forth.

Complainant asserts that the principal fact of blacklisting may be rationally inferred from the following secondary facts:

1. While employed by SERI/MPL, and as part of his responsibilities in that position, Complainant gave an instructor an unsatisfactory rating. Complainant was subsequently

reprimanded by his supervisor, Ken Beatty, for "harassing" this instructor, and Complainant's supervisory responsibilities were removed.

2. Complainant filed a plant quality deficiency report which was not forwarded by SERI/MPL to the Nuclear Regulatory Commission.

3. Complainant informed Ken Beatty that a contracted employee of SERI/MPL was not performing his duties; Complainant was subsequently reprimanded by Ken Beatty.

4. Complainant contacted Memphis State University to ascertain whether the American Technical institute, which provided educational services to SERI/MPL, was accredited; this action was described by Ken Beatty as an act of insubordination,

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and he requested Complainant undergo psychological testing.

5. Complainant filed an anonymous complaint with the SERI/MPL Ombudsman concerning harassment and intimidation directed at him by Ken Beatty.

6. Complainant was terminated by SERI/MPL approximately two weeks after the complaint was filed with the Ombudsman.

7. Complainant was unable to secure employment for approximately thirteen months following his discharge by SERI/MPL despite initial demonstrated interest in him by LILCO and Stone & Webster.

8. Complainant began working for TVA on March 4, 1987 and was abruptly terminated on March 11, 1987.

9. On March 11, 1987, at approximately 9:30 a.m. CST, a DOL official in Jackson, Mississippi contacted SERI/MPL notifying them that Complainant had filed charges against SERI/MPL alleging unfair labor practices.

10. On March 11, 1987, at 10:02 EST, 28 minutes prior to the time SERI/MPL was notified by DOL, a decision had been made by TVA to terminate Complainant (Complainant's August 4, 1989 Response, Ex. 33).

11. Complainant was terminated by TVA around noon on March 11, 1987 (Trieber affidavit of August 2. 1989, #27; Trieber Dep. at 37).

Viewing the facts as stated in the light most favorable to the Complainant, and accepting them as true, there is no evidence, as opposed to remarkable coincidence, linking these summarized events to blacklisting by SERI/MPL with cooperation by TVA. I do not find that because his discharge by TVA followed closely in time from DOL's

telephone contact with SERI/MPL, blacklisting is the inevitable conclusion. Absent any evidence linking the two occurrences together, it cannot be rationally inferred that TVA's termination of Complainant was a direct or indirect result of, or connected to, the telephone call from DOL to SERI/MPL. Other than his belief that he has been blacklisted, Complainant has not offered legally sufficient evidence to support his contention. Moreover, the information in

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Complainant's Exhibit 33, which is unrefuted, indicates TVA's decision to terminate Complainant occurred prior to the time of the DOL telephone call to SERI/MPL.

Complainant filed a Motion to Compel and for Discovery Sanctions on October 19, 1989. This motion is based on allegations TVA has misrepresented the existence of long distance telephone call records on individual employees. Complainant asserts that based on information from two TVA employees, who are not identified, TVA has the ability to obtain a record of long distance telephone calls made from the Sequoyah plant, and for the last two years TVA managers have received monthly reports of the long distance calls of their subordinates in order to monitor the use of long distance services. In addition to not identifying the subject employees, Complainant proffered no supporting affidavits with this motion.

Complainant has been afforded every reasonable consideration for discovery: on September 16, 1987 an Order issued allowing leave for further discovery until December 31, 1987; on October 26, 1988 an Order issued allowing additional discovery to be completed within sixty days of what order; on February 10, 1989 an Order issued allowing additional time for discovery; on April 13, 1989 the discovery schedule was again extended, and on June 21, 1989 and order issued allowing Complainant to complete discovery by July 21, 1989. Complainant has had ample opportunity to complete discovery and has not supported his motion for further discovery; accordingly, his motion for additional discovery is denied.

In addition to having had ample opportunity to complete discovery, the following exhibits submitted by Complainant further indicate the futility in granting his motion:

Exhibit 29: [William Benson, investigator for TVA Office of Inspector General; interview of Richard Thompson)

"Thompson stated that he has not been contacted nor has he contacted anyone outside of TVA or within TVA about Marshall Trieber, and he based his decision to recommended [sic] the termination of Trieber solely on his own feelings and those of his supervisor and of Hartman."

Exhibit 31: [Benson interview of Dan DeFord)

"DeFord stated that he never made any inquiries

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about Marshall Trieber before, during, or after, the time Trieber worked for TVA."

Exhibit 32: [Benson interview of Hartman]

"Hartman advised that he had not been contacted by anyone from within or outside of TVA pertaining to Trieber prior to his coming to work with TVA."

Exhibit 33: [report of Norman Zigrossi, TVA Inspector General]

"No evidence was developed to support the notion that TVA employee received information from an MP&L official that led to the termination of Trieber's employment."

Exhibit 34: [summary of TVA investigative report]

"There is no evidence to support Trieber's allegation that TVA cooperated with MP&L in blacklisting him or in terminating his employment as a TVA contractor."

CONCLUSION

Since Respondents have shown they are entitled to summary judgment as a matter of law or, the issue of the sufficiency or Complainant's evidence, the respective motions for summary judgment properly lie.

ORDER

It is hereby ORDERED that Respondent TVA's Motion for Summary Judgment is GRANTED.

It is hereby ORDERED that Respondent SERI/MPL's Motion for Summary Judgment is GRANTED.

Further, it is hereby ORDERED this decision be forwarded to the Secretary of Labor with the recommendation this complainant be DISMISSED.

JAMES GUILL
Associate Chief
Administrative Law Judge